IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-5088

CECIL C. JOHNSON, JR,

Petitioner,

V.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT A. GRUNOW
Deputy Attorney General
-Counsel of Record-
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7859

KYMBERLY LYNN ANNE HATTAWAY
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2216

OF COUNSEL:

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL & REPORTER
STATE OF TENNESSEE

QUESTIONS PRESENTED FOR REVIEW

I. Whether the cumulative effect of alleged prosecutorial misconduct violated the petitioner's right to a fair trial and infringed upon his right to prepare and conduct his defense.

A. Whether the prosecution acted improperly in "converting" Victor Davis into a witness for the State.

B. Whether the cumulative effect of alleged prosecutorial misconduct at trial denied the petitioner his right to a fair trial.

II. Whether the trial court erred in suppressing at the punishment phase of the trial the proposed testimony of Dr. Thomas Ogletree regarding the relationship between youth and accountability for decision-making or maturity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited: Page(s):

Other Authorities Cited:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-5088

CECIL C. JOHNSON, JR.,

Petitioner,

V.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF TENNESSEE

The respondent respectfully submits that the petition for writ of certiorari filed in this cause should be denied.

OPINIONS BELOW

On March 9, 1981, the trial court denied the petitioner's motion for a new trial. The judgment of the trial court was affirmed by the Supreme Court of Tennessee on May 3, 1982. That opinion is officially reported at 632 S.W.2d 542.

The petitioner filed a petition to rehear with the Supreme Court of Tennessee on May 13, 1982. The petitioner's petition to rehear was summarily denied on May 21, 1982.

JURISDICTION

The petitioner seeks to invoke this Court's jursidiction under 28 U.S.C. § 1257(3). However, the respondent submits that this record does not present a substantial federal question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment, United States Constitution:

> . . . (N)or shall any state deprive any person of life, liberty, or property, without due process of law.

Tenn. Code Ann. § 39-2402:

> (a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any . . . robbery . . . is murder in the first degree.
>
> (b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

Tenn. Code Ann. § 39-2404:

> (a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as a part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt . . .
>
> (c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances . . .; and any evidence tending to establish or rebut any mitigating factors . . .
>
> (g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death . . .
>
> (i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of one or more of the statutory aggravating circumstances, which shall be limited to the following . . . :
>
> (3) the defendant knowingly created a great risk of death to two or more persons,

other than the victim murdered, during his act of murder . . . ,

(6) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

(7) the murder was committed while the defendant was engaged in committing . . . any . . . robbery . . .

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) the defendant has no significant history of prior criminal activity . . .

(7) the youth or advanced age of the defendant at the time of the commission of the crime . . .

STATEMENT OF THE CASE[1]

On August 5, 1980, the Davidson County Grand Jury returned a seven-count indictment charging Cecil C. Johnson, Jr. with the following crimes:

Count One - Armed robbery of Robert Bell, Jr. and Robert Bell, III;

Count Two - Armed robbery of Louis E. Smith;

Count Three - First degree murder of Robert Bell, III;

Count Four - First degree murder of James E. Moore;

Count Five - First degree murder of Charles H. House;

Count Six - Assault with the intent to murder Robert Bell, Jr. in the first degree; and

Count Seven - Assault with the intent to murder Louis E. Smith in the first degree. (I, 2-10).

On September 23, 1980, the respondent filed a motion for notice of alibi defense. (I, 15).

On October 17, 1980, the trial court granted the petitioner's request for discovery, inspection and notice of intent to use evidence. (I, 32). The petitioner's request for same and the respondent's answer thereto do not appear in the pleadings.

The petitioner filed a notice of alibi and a motion for disclosure of witnesses on November 17, 1980. (I, 36-37). The pleadings are silent as to the disposition of said motion. On January 3, 1981, the petitioner moved to exclude the testimony of any witness not listed on his motion; the name of Debra Ann Smith

---

[1] References to the record will be referred to by volume and page number. Volume I consists of the pleadings; Volumes II and III consist of the transcript of the pre-trial motion hearings; Volumes IV through X consist of the transcript of the voir dire proceedings; Volumes XI through XVIII consist of the proof adduced at trial; Volumes XIX and XX consist of the proof adduced at the sentencing hearing; and Volume XXI consists of the transcript of the post-trial motion hearing.

appears on the face of the motion. (I, 50-51). The trial court denied this motion on January 8, 1981. (I, 54).

Jury selection began on January 13, 1981, with the taking of proof on January 16, 1981. On January 19, 1981, the jury returned a verdict of guilty as charged; punishment was assessed at life imprisonment on each of Counts One, Two, Six and Seven. (I, 79-80). The sentencing hearing on the convictions for first degree murder as alleged in Counts Three, Four and Five commenced and was completed on January 20, 1981; punishment was assessed at death by electrocution on each count. An execution date of May 20, 1981 was ordered by the trial court. (I, 87-90).

The respondent filed a motion for consectutive sentencing on January 30, 1981. (I, 93-95). The petitioner filed an answer thereto on March 4, 1981. (I, 114-17).

On February 19, 1981, the petitioner filed a motion for judgment of acquittal and a motion for a new trial. (I, 96-113). The respondent filed answers to said motions on March 6, 1981, and March 8, 1981, respectively. (I, 140-51, 155-57).

On March 4, 1981, the petitioner filed a notice of filing of affidavits and an amendment to his motion for a new trial, accompanied by the affidavits. (I, 118-30). The respondent filed a motion to strike the affidavits on March 6, 1981. (I, 152-54).

The petitioner's motion for judgment of acquittal and motion for a new trial were heard and taken under advisement on March 6, 1981. (I, 158). On March 9, 1981, the trial court entered orders denying the petitioner's motion for judgment of acuittal (I, 159); granting the respondent's motion to strike the affidavits (I, 160); overruling the petitioner's motion for a new trial (I, 169-72), with an accompanying memorandum of law (I, 162-168); and granting the respondent's motion for consecutive sentencing (I, 173-75). The trial court also ordered

on the same day the sealing and inclusion in the record of a letter received by the court from juror George B. Davis. (I, 161).

The petitioner filed a notice of appeal on March 11, 1981. (I, 176-77). On March 20, 1981, the petitioner filed a motion for stay of execution pending the filing and disposition of this petition; said motion was granted by the Honorable Chief Justice William J. Harbison on March 23, 1981. (I, 178-80).

The petitioner timely filed the instant petition for writ of certiorari with this Honorable Court.

STATEMENT OF THE FACTS

I. THE GUILT PHASE OF THE TRIAL

A. The Respondent's Proof

Frank House, the brother of the deceased Charles House, testified that the deceased was visiting him at his home which was located in the neighborhood where the crime occurred on July 5, 1980. Around 9:30 p.m., Charles House left to use the telephone at Bob Bell's Market. (XI, 27, 33, 35).

Harry Moore, the father of the deceased James Moore, testified that his son had been a cab driver for Supreme Cab and had grown up in Nashville. (XI, 40-41).

Lewis Smith testified that he was hired by Robert Bell, Jr. [hereinafter referred to as Bell] to rebuild a motor. (XI, 46). On the night of July 5, 1980, he and another young man were working on the motor at Bob Bell's Market. Bell and his son Robert Bell, III [hereinafter referred to as Bobbie] were present at the time. Around 9:30 p.m., Bell left the market to take the young man to his apartment, a trip which probably took around ten minutes to accomplish. (XI, 48, 76-77).

Five minutes after Bell had returned, a man the witness later identified as the petitioner entered the store. (XI, 77). Smith heard Bell and the petitioner arguing; he looked over at the two and saw the petitioner with a cocked pistol held down beside his leg. The petitioner told Bell, "Bob Bell, you know I don't have anything to lose" to which Bell replied,"Well, I know that [but] (m)an I have got a twelve year old son." (XI, 49). At this point, the petitioner kicked Smith in the back and said, "get up white man;" Smith complied with the order. (XI, 49). The petitioner, who had the gun placed in Bell's back, ordered the witness behind the counter where Bell and Bobbie were standing. (XI, 50). A male or female customer came in and the petitioner told his

hostages to "act cool;" and the petitioner then put his arm around Bell and started talking about Bell's "good barbecue." (XI, 50). At some point, a woman (probably a woman and child) entered the store. (XI, 50-52).

The petitioner then told the extremely frightened Bobbie to put the money in the sack which the appellant had given him. During this time, a man Smith later identified as Charles House entered the store. (XI, 69). The petitioner, whose gun was visible, told House to get the hell out, which House promptly did. (XI, 51-53). The petitioner then searched both Bell and Smith for a weapon and indicated that he wanted more money. (XI, 53). The petitioner also took the witness' driver's license and told him,"I don't want you to even have these on you." (XI, 53). After taking Bell's and Bobbie's glasses and throwing them to the floor, the petitioner began shooting his victims even though they had offered no resistance or provocation and even though Bell had begged the petitioner not to do anything, as his twelve year old son was present. (XI, 69-70, 83). Bobbie was shot first and after he fell to the floor, Smith fell on top of him to protect him. Smith himself suffered a gunshot wound to the hand and throat. (XI, 53-54, 71). Smith then heard some pistol shots outside the store, followed by the sound of a shotgun being fired. The witness, who called the police, saw Bell return to the market holding a shotgun. (XI, 54-55). Smith stated that the petitioner was in the store not more than fifteen minutes. (XI, 62).

Soon after the crime, Smith viewed a photographic lineup and chose two pictures which "pretty close(ly)" resembled the intruder; one of the photographs depicted the petitioner. (XI, 65). Smith also viewed a corporeal lineup at which he did not identify the petitioner because he was not "absolutely positive" that the petitioner was the man, although he stated that he was sure it was

the petitioner even though the petitioner had his hair curled during the lineup. Immediately after coming out of the lineup room, the witness told investigators from the District Attorney General's Office and the Public Defender's Office that No. 2 (the petitioner) was the assailant. (XI, 65-67, 78).

Bob Bell testified that he owned two drive-in markets and a barbecue market in Nashville. On July 5, 1979, Lewis Smith and another young man were modifying a boat engine Bell had given his son, Bobbie, at Bob Bell's Market. (XII, 85-86). Around 9:00 p.m. or perhaps as late as 9:30 p.m., Bell drove the other boy home so he could get ready for a date; Bell returned within ten minutes. (XII, 89-90, 119-20). When he returned, Bobbie was watching television and Smith was still working on the engine. (XII, 91-92). As the witness walked back to where Smith was to check on the motor, the petitioner walked into the store. The petitioner pulled out a pistol and said "if you take another step I will blow your brains out." (XII, 92-93). The petitioner then ordered Bell to walk towards him, which Bell did. As the petitioner was patting down the witness, he threatened, "If I find a gun I am going to kill you." (XII, 94, 97). The petitioner then walked over to Smith and kicked him, ordering the "white boy to get up." At the petitioner's behest, Bell and Smith joined Bobbie behind the counter. (XII, 97-98).

While the petitioner and his captives were standing behind the counter, a woman and two children entered the market (the customers were apparently not together). (XII, 99, 140-41). While the woman was there, the petitioner told his victims to act natural and he started talking about Bell's "good barbecue." Although the woman could not see the petitioner's gun, which was a .32 or .38 caliber dark colored revolver, she could see Bobbie crying. (XII, 129-30, 134). After the customers left, the petitioner ordered Bobbie to fill a bag with

money from the cash register; Bobbie obeyed. (XII, 100-01). After getting this money, the petitioner searched Smith and Bell. While he searched Smith, Charles House came in the market and the petitioner ordered him to get out. (XII, 112, 143-46). During his search of Bell, the petitioner unzipped Bell's pants, stuck his hand down them and said, "I ought to blow your nuts off." (XII, 146). After taking Bell's and Bobbie's glasses and throwing them over the counter, the petitioner began shooting. Bell heard Bobbie holler and saw Smith fall on top of Bobbie. (XII, 102-03). Something knocked Bell to the floor, and the witness counted to ten before raising his head. When Bell looked up, he observed the petitioner walk toward him, point the gun at his head and pull the trigger as he turned his head. Fortunately, the witness threw his hands up and was only shot in the wrist. (XII, 103-04). Bell jumped up and got his shotgun (accidentally discharging it), heard two shots outside and saw the petitioner standing beside a car parked outside the store. (XII, 105-06). The witness ran outside and saw two men in the car who had been shot. He then began chasing the petitioner in a southern direction (toward Gilmore Avenue) before he lost sight of him. (XII, 107). Bell ran back to the store to check on his son and to stop a passing car for assistance in calling the police. (XII, 108).

The following day, Bell identified the petitioner from a photographic lineup and sometime later picked him out in a corporeal lineup. (XII, 113-14). According to Bell, the petitioner had been a regular customer for about four months prior to the incident. (XII, 148). During that time, the petitioner would visit the market four or more times a week, sometimes wearing his hospital uniform. (XII, 108-10). On one occasion, the petitioner told him he had been to Ohio and could not find a job; sometime later the petitioner told Bell he was working at Vanderbilt Hospital. (XII, 108-09). Two or three

days before the massacre, the petitioner was in the store and loaned a man some change so the man could purchase a quart of beer. (XII, 110). Although Bell did not know the man's name, he saw him in the crowd the night of the crime and asked him to tell the police the name of the individual who had loaned him the change. (XII, 111).

Officer Wesley Carter testified that he arrived at the crime scene at 10:04 p.m. (XII, 173). While trying to reduce the flow of blood from Bell's wound, the officer asked Bell if he knew who had done it or if he had seen the man prior to the incident. (XII, 173-76). Bell replied that the assailant had been in the store on previous occasions and that he thought the man was from Louisville, Kentucky. (XII, 176, 178). Bell pointed to a man in the crowd and told Carter that the man knew the assailant and had been in the store with him previously. (XII, 177). Carter spoke to this man and got his name (Leroy Johnson) and address; the man said he did not know anything about it. (XII, 177-78).

Dr. Christopher Ashhurst testified that he prformed post-mortems on James Moore, Charles House and Robert Bell, III. Each victim had died from massive hemorrhaging occasioned by a gunshot wound. He was able to recover projectiles from all three bodies, which he gave to Officer William Merriman. (XIII, 195-201).

Officer W. R. Arnold, a police photographer, arrived at the death scene at 10:25 p.m. (XIII, 208). By that time, the ambulances had transported Bell, Smith and Bobbie to the hospital. (XIII, 210). Arnold photographed the scene and identified the resulting photographs. (XIII, 216-221).

Officer Leslie Olson also arrived on the scene at 10:25 p.m. He recovered a bullet fragment from behind the counter and deposited it with the booking room. (XIII, 223, 225).

Officer William Merriman recovered the bullets

removed from the dead bodies and placed the bullets in the custody of the property room. (XIII, 228).

Patrick Garland, a senior firearms examiner with the Tennesee Bureau of Investigation, examined the five bullets which had been recovered from the victims and the crime scene. His analysis showed that all of the bullets were consistent with those normally used in a .38 caliber weapon, were fired from a revolver and were of different origins. (XIII, 229-39).

Areda Hereford testified that a driver for Supreme Cab named "James" dropped her off at her home on Elwood Avenue around 9:50 p.m. or 9:55 p.m. and then proceeded in the direction of Bob Bell's Market. (XII, 241-43). Close to 10:00 p.m., she heard noises which sounded as if firecrackers were being detonated and shortly thereafter her brother told her that the cab driver had been shot. (XIII, 243).

Walter Davis walked to the market around 9:55 p.m. (XIII, 246, 254). He saw a cab dropping off a female passenger on Elwood Avenue and then saw the cab drive to Bob Bell's Market and back into the parking lot. (XIII, 246-47). As the witness went into the store, he observed a man in the nearby telephone booth. (XIII, 247-48). While making his purchase, Davis observed a white man working on a motor, with Bell standing behind the white man and Bobbie standing at the cash register. (XIII, 249-50). When Davis left the store, the cab driver was alone in his cab and the man was still in the telphone booth. (XIII, 250). Davis later returned to the scene. (XIII, 252-53).

Amanda Perry stated she drove by Bob Bell's Market sometime before 10:00 p.m. She saw Bell in the parking lot hollering for help and holding a shotgun in his hand. At Bell's request, Perry's sister called the police. (XIII, 257-59, 261). After the ambulance had arrived, Perry heard Bell ask Michael Lawrence, "what

was that nigger's name that was down here the other night?;" Lawrence did not know. (XIII, 259-60, 262).

Michael Lawrence testified that he arrived at the market around 10:30 p.m. (XIII, 263-64). Bell told him that he (Lawrence) knew something about this and that the man who had given him some change two days previous had done it. Lawrence thought to himself that the petitioner had been in the store with him at that time, but didn't tell his thought to Bell. Lawrence further related that on the Thursday before the Saturday shooting, the petitioner loaned him money so he could purchase a quart of beer. (XIII, 266-67, 269).

Detective Larry Flair testified that at 2:00 p.m. on the day following the carnage, he displayed a photographic lineup consisting of six photographs to Bell at Baptist Hospital. (XIII, 271, 274). Bell identified a photograph of the petitioner. (XIII, 275-76).

Debra Ann Smith stated that she patronized Bob Bell's Market between 9:30 p.m. and 9:50 p.m. with her son and boyfriend's son. (XIII, 280-81). When she arrived, she saw a man using the phone in the telephone booth outside the store and a cab parked in front of the store. (XIII, 281-83). As she entered, she saw Bell, Bobbie, the petitioner and another boy (whom she alternately stated was white or black) behind the counter. (XIII, 284-86). Smith, who had known the petitioner for two years, "knowed that [the petitioner] was going to rob them" but did not see a gun. (XIII, 285-87, 318). She proceeded to purchase a soft drink from Bobbie, who was crying, and then left the store. (XIII, 287). Upon leaving, she noticed that the cab driver was still seated in his cab and the man who was in the telephone booth was talking to the driver through the window. (XIII, 318-20, 325). Smith returned to her boyfriend's home and told him that Bob Bell was going to be robbed. She then went to her own house and told her sister that there

was a robbery occurring at Bob Bell's Market (XIII, 287-88).

Victor Davis, who had twice been convicted of burglary and who was granted immunity from prosecution in the instant case, testified that he first saw his friend, the petitioner, around 3:00 p.m. on Tenth Avenue South on the day in question. (XIV, 337-340). They drove to East Nashville to pick up the petitioner's "old lady" (Merle Stanley) and then carried her to several liquor stores so that she could cash a check. Davis then drove the pair downtown and dropped them off. (XIV, 338, 340, 398-99). Around 4:00 p.m., Davis again saw the petitioner at the corner of Wayne and Belmont Avenues. (XIV, 341-43). They rode around together for awhile and then decided to go to Franklin to attend a motorcycle meeting. (XIV, 343).

Once in Franklin, the two purchased some chicken at Kentucky Fried Chicken and then followed some "dudes" to a gambling place near a high school. (XIV, 344). They gambled for an hour, during which time Davis thought he had won some money and the petitioner had lost some money. (XIV, 345). They then rode around some more and met three girls who were standing out on the street. After conversing with the girls for an hour or an hour and a half, Davis and the petitioner returned to Kentucky Fried Chicken to get something to eat. (XIV, 345-46). While they were parked at the restaurant, the petitioner told Davis he was going to rob it. The petitioner got out of the car, carrying a dark colored .38 caliber gun on his person, and approached the restaurant. After speaking to someone at the establishment, the petitioner returned to Davis' vehicle and said it was closed. (XIV, 347-49). They then stopped at a store across the street from Kentucky Fried Chicken, purchased some beer and proceeded to Nashville. (XIV, 350). Although Davis was not certain when they left Franklin, it was after 9:00 p.m., possibly 9:30 p.m., when they left. (XIV, 412).

They returned to Nashville via Franklin Road since Davis had a bad tire rim on his car. (XIV, 371-72, 403). Because of the tire rim, Davis estimated it took about forty-five minutes to get to Nashville. (XIV, 412).

Close to 10:00 p.m., Davis and the petitioner arrived in Nashville. (XIV, 410-11). They exited Franklin Road at Eighth Avenue South and proceeded to Twelfth Avenue South and Kirkland Avenue, which was one short block from Bob Bell's Market. (XIV, 353-54). Once there, the petitioner then exited the vehicle. (XIV, 353-54). Davis next saw the petitioner three or five minutes later about twenty to twenty-five yards from the petitioner's father's house on Gilmore Avenue. (XIV, 355-56). The petitioner got in Davis' car and said "I didn't mean to shoot that boy." (XIV, 360). The petitioner, who had a bag in his hand, threw a gun to the ground. (XIV, 386-87, 417). Davis got out of the car, retrieved the gun and sold it the next morning for forty dollars to an unknown man on Lafayette Street. (XIV, 387; XV, 418-21). Before selling the gun, Davis emptied it of bullets. (XIV, 421-22).

Davis and the petitioner went into the petitioner's father's house. The news was on television and Mr. Johnson, Sr. was watching it on the couch. (XIV, 358, 413). In the presence of his father, the petitioner counted about two hundred dollars from the bag; he gave Davis forty dollars of the money. (XIV, 358, 416). The petitioner told his father they had been to Franklin where they had been gambling. (XIV, 359). The petitioner also called Merle Stanley at Vanderbilt Hospital and spoke to her for ten minutes. (XIV, 359). Davis and the petitioner then left and drove to the Kwik-Sak where they purchased some beer and gas and met a couple of friends, Wayne Walker and Greg Daniels. They drove to Walker's house where they drank the beer. Daniels mentioned the incident at Bob Bell's Market; the petitioner was calm throughout

this time. Davis and the petitioner then went to the Regis Restaurant to eat before Davis dropped the petitioner off at the Sam Davis Hotel. (XIV, 360-64).

Davis next saw the petitioner on August 29th when he (Davis) was arrested on a burglary charge. While they were in jail together, on one occasion the petitioner told him to stick with what he was saying because there might be some police wanting to see them, "so we ain't going to talk about it, just don't talk to each other." (XIV, 365-66).

Davis admitted that he had given lengthy statements to both the petitioner and the prosecution on July 17, 1980, in which he omitted any incriminating reference to the petitioner and himself. (XIV, 350-52, 392; XV, 393-96). He also stated that he had gone to Franklin with investigators from the Public Defender's Office to show them where he and the petitioner had been on the day in question. (XIV, 369-71). According to Davis, he did not tell the investigators the important omissions from his previous statements because he did not want to get involved. (XIV, 352-373-74).

Davis further testified that he was arrested on the night of January 10, 1981, by Officer Patton at the intersection of Eighth and Wedgewood Avenues. According to Davis, Patton stopped the vehicle in which he was riding on suspicion of attempted armed robbery. After Patton found a shotgun in the car, Davis was taken downtown. (XIV, 375-77). Within thirty minutes of his arrival downtown, Davis was taken to the District Attorney General's Office where he spoke with Generals Shriver, Gray and Johnson and Investigator Sledge. (XIV, 379-80). After being advised of his right to the presence of his attorney, George Duzane, Davis asked them to call Duzane and they tried to do so. (XIV, 381-82). After repeating to them the substance of his previous statements, Davis then changed his story to what he testified at trial because

he did not want to be charged with something he did not do. (XIV, 383). No one told him that he would be indicted if he testified as a defense witness, but someone said he had to go to court and Davis assumed that meant he would be indicted. (XIV, 384-86). Davis also testified that he was treated "fine" and was not threatened in any way. (XV, 430). He admitted that he had drunk a little and had smoked a little marijuana prior to his arrest. (XV, 429-30).

After leaving the District Attorney General's Office around 4:00 a.m., Davis spoke with his attorney who told him that General Gray had been trying to reach him since the preceding Monday. (XV, 431-32). On Saturday afternoon, Davis met with defense counsel but did not tell him of the new developments in his statement since Duzane had advised him not to discuss it with anyone. (XIV, 390). On Monday, Davis and his attorney met with General Gray and Davis gave a formal statement. It was at this time that Davis was promised immunity, which the defendant interpreted as meaning that he would not be charged with anything pertaining to the instant case. (XIV, 387; SV, 432-33).

B. The Petitioner's Proof

The petitioner testified that he had lived with his father on Gilmore Avenue (two blocks from Bob Bell's Market) from January to May of 1980. (XV, 438). During that time, he frequented the market about twice a week. (XV, 444-45). Since May, however, he had lived at the Sam Davis Hotel and had visited the store only once on July 3rd when he gave Michael Lawrence some change with which to purchase beer. (XV, 445-56). The petitioner also stated that his mother lived in Louisville, Kentucky, and that he had been employed by the dietary department of Vanderbilt Hospital since the end of February. (XV, 439, 443).

Sometime before noon on July 5, 1980, he met Victor Davis on Tenth Avenue South. They picked up Merle Stanley in Bordeaux and took her to several liquor stores so that she could cash a check. (XV, 451-52, 455-56). Davis then carried the defendant and Stanley downtown and dropped them off. (XV, 456-57). After spending some time downtown with Stanley, the petitioner returned to Tenth Avenue South and again saw Davis. Around 3:30 p.m., the two decided to go to Franklin. (XV, 459-60).

Once in Franklin, the petitioner and Davis ate at Kentucky Fried Chicken. They then followed some men to a beer party which was being held near an old high school. (XV, 461). They gambled at the party, with the petitioner winning eighteen dollars and Davis also winning. (XV, 462-63). They then rode around Franklin and met four or five young black women who were standing on the sidewalk. While conversing with the women, Davis held one of the ladies' baby for awhile. (XV, 465-66). It was dark at this time and the petitioner and Davis returned to Kentucky Fried Chicken to eat. There, a young white lady told the petitioner that the restaurant was closed, so they returned to Nashville via Franklin Road. (XV, 466-68). According to the petitioner, they did not take the interstate because they did not know how to reach it and he noticed no difficulties with Davis' car. (XV, 467-68).

When the petitioner and Davis reached Nashville, they exited at Tenth Avenue and went directly to his father's house. (XV, 469). His father was watching a movie on television. The petitioner called Merle Stanley and spoke to her for eleven or twelve minutes; Stanley told him that she needed him to pick her up from work at Vanderbilt Hospital. (XV, 472, 486). The news came on after the petitioner completed his call and the petitioner then told his father he had been to Franklin and had won eighteen dollars. (XV, 474). Davis pulled out nineteen

or twenty dollars which he said he had won gambling. (XV, 473). Just as the petitioner and Davis were leaving, Merle Stanley called to tell the petitioner not to pick her up. (XV, 476, 486). While they conversed for about five minutes, Davis was outside. (XV, 476-77). After having been at the house at least twenty-two to twenty-five minutes, the petitioner and Davis left to go to the Kwik Sak. While there, they purchased some beer and gas and met two of Davis' friends. (XV, 475, 477). All four went to one of the friends' house where they drank beer and smoked marijuana. During this time, a young lady came up and told them what had happened at Bob Bell's Market. (XV, 477-79). The petitioner and Davis left and then ate at a restaurant near the Greyhound Bus Station. Davis then dropped him off at the Sam Davis Hotel. (XV, 480-81).

The petitioner further admitted that he could not remember Davis' name when he initially spoke to the police and his own defense attorney. (XV, 492). He also admitted having owned a .22 caliber derringer, but said he had lost it. (XV, 486). Finally, the petitioner denied that he had robbed or shot the people at Bob Bell's Market; that he had told Davis that he was going to rob the Kentucky Fried Chicken; that he had told Davis to "stick to his story;" and that he had told Davis that he had not meant to "kill that child." (XV, 470, 481-82, 489-91).

Gloria Patterson, a resident of Franklin, testified that she met the petitioner on the night of July 5, 1980, in Franklin. She permitted the petitioner to hold her baby. (XVI, 508-10).

Cecil Johnson, Sr., the petitioner's father, stated that the petitioner and Davis came to his house on Gilmore Avenue just as the news was coming on television. The petitioner told him that he had been gambling in Franklin and showed him thirty or thirty-five dollars;

the witness did not see any other money. (XVI, 514-15). His son called Merle Stanley and they were on the phone for a total of ten minutes. (XVI, 515-518). When the petitioner and Davis were leaving, Stanley called the petitioner and they spoke for a few minutes more. (XVI, 519). The petitioner and Davis left the house as the weather report was coming on. (XVI, 520). After they had left, Stanley called again while the sports report was on and the witness told her that his son had left. (XVI, 521). Johnson also testified that his son denied any knowledge of the crime upon being informed the next day that the police wanted to talk to him. (XVI, 527).

Jerome Patterson stated that sometime before midnight on July 5th, he patronized Bob Bell's Market. He saw Bell, Bobbie and two white men in the store. (XVI, 529-30). As he was returning home in a northerly direction (away from Gilmore Avenue), he saw a black cab back into the parking lot. Patterson then heard a shot and saw Bell run out of the market holding his arm. He then heard someone shout "dere he go running down the alley." (XVI, 533). The witness did not observe anyone leave the market before Bell and did not see anyone in the phone booth. (XVI, 534).

Merle Fran Stanley testified that she knew the petitioner from working together at Vanderbilt Hospital. (XVI, 537). On the morning of July 5th, the petitioner and Davis drove her to several liquor stores so she could cash a social security check. (XVI, 538-41). Davis dropped her and the petitioner off downtown; sometime after 1:00 p.m. she took a bus to work. (XVI, 541).

At 9:30 p.m. or 9:45 p.m., the petitioner called her at work and they conversed together until 9:55 p.m. (XVI, 542-43). Around 10:07 p.m. or 10:10 p.m., she called the petitioner and they spoke until "something to eleven [o'clock]." (XVI, 547). She called him again and his father said he had just left. (XVI, 544-46).

Stanley stated that she did not ask the petitioner to pick her up that night. (XVI, 550). She also admitted having visited the petitioner in jail, but testified that they did not discuss the case. (XVI, 548).

Jeannette Edging testified that she was employed by the Franklin Kentucky Fried Chicken on July 5, 1980. At 9:04 p.m. or 9:05 p.m., she clocked out. A man she later identified as the petitioner came to the door about 9:20 p.m. or 9:25 p.m. and she told him that the restaurant was closed. The petitioner had been parked in a green car in the parking lot for awhile. (XVI, 562-66). When she went outside to wait for her ride, the petitioner was still there. He left and her ride arrived about five minutes later, which was shortly after 9:30 p.m. (XVI, 562, 567).

C. The Respondent's Rebuttal Proof

Detective Gordon Larkin testified that, pursuant to a search warrant, he removed from the petitioner's motel room one blue and one green uniform from Vanderbilt Hosiptal; the petitioner had denied owning these uniforms on cross-examination. (XVI, 505-07, 568-71).

Investigator James Sledge from the District Attorney General's Office stated that on July 20, 1980, he travelled the route from Franklin to the Petitioner's father's house via Franklin Road. The journey took twenty-nine minutes at a speed of forty-five miles per hour. According to Sledge's calculations, if a person left Franklin at 9:25, he would arrive in Nashville at 9:54. (XVI, 581-82).

II. THE SENTENCING PHASE OF THE TRIAL

A. The Respondent's Proof

The respondent relied upon the evidence adduced at the guilty phase of the trial to establish the aggravating circumstances of the crime.

B. The Petitioner's Proof

Cecil Johnson, Sr. testified that he and the petitioner's mother produced seven children. The petitioner was seven years old when they separated and was raised by the witness. The separation had no impact on the petitioner, who had never been a "problem." (XIX, 21-22). The petitioner began working at fourteen and dropped out of school at sixteen. (XIX, 23). The petitioner wanted to be a chef and was very proud of his job at Vanderbilt Hospital. (XIX, 24-25). Finally, the witness testified that the petitioner did not attempt to flee upon being told the police were looking for him regarding the incident at Bob Bell's Market. (XIX, 28-29).

Linda White, the petitioner's sister, testified that the petitioner was a "normal" boy and brother while they were growing up. (XIX, 31-32). She also stated that the petitioner, while unemployed, temporarily took care of another sister's children after that sister's husband died. (XIX, 32-33). According to White, the petitioner and his wife separated after another man tried to prevent him from entering his own house. (XIX, 33).

In the presence of the jury, Dr. Leslie Hutchinson, an expert in the field of psychology, discussed his familiarity with the rehabilitative services available within the Department of Corrections. (XIX, 65-67). In Dr. Hutchinson's opinion, the rehabilitative programs can have a positive effect on some inmates depending upon the individual inmates' personality characteristics. (XX, 68). As he had never interviewed the petitioner, Dr. Hutchinson stated that he held no opinion whether the petitioner could benefit from the programs. (XX, 69). He also admitted that psychopaths are generally more resistant to rehabilitation. (XX, 74-75).

Gerald Grubb, a chaplain employed by the Department of Corrections, testified that the available religious rehabilitative services can change some inmates and has

no effect on others. (XX, 91-95).

Following the completion of their deliberations, the jury returned a verdict of death for the murders of Bob Bell, III, James Moore and Charles House. As to the murder of Bell, the jury found the presence of three aggravating circumstances: the petitioner knowingly created a great risk of death to two or more persons other than the victims murdered during his act of murder; the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the petitioner; and the murder was committed while the petitioner was engaged in committing robbery. As to the murders of James Moore and Charles House, the jury found the presence of the aggravating circumstances that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the petitioner. (XX, 126-28). Thereupon, the trial court accepted the jury's verdict and sentenced the petitioner. (XX, 129-30).

III. THE POST-TRIAL MOTION HEARING

Officer John Patton testified that he arrested Victor Davis for public drunk and carrying a weapon after stopping the vehicle in which Davis was a passenger. The vehicle was stopped after Officer Patton observed the highly suspicious conduct of two of the men in the vehicle at a service station. (XXI, 38-45).

About 5:30 p.m. on that day, he spoke with Detective Larkin concerning Davis, but did not remember the specifics of that conversation. (XXI, 38). Patton testified that he might have made one pass by an area on Tenth Avenue South to look for Davis. This area was a place where young black males frequently congregate to drink and gamble and the officer usually checks it three or four times nightly. (XXI, 51). At the time Patton arrested Davis, he radioed Larkin who told Patton

that he wanted to speak to Davis. (XXI, 46, 49-50). Patton took Davis and his companions downtown to obtain warrants on them and gave Davis' committal to Larkin around 1:00 a.m. (XXI, 46, 55).

Detective Gordon Larkin testified that around 5:30 p.m. on January 9, 1981, he spoke to Officer Patton and told him that if Patton saw Victor Davis, he wanted to talk to Davis. (XXI, 56). The day before, General Gray had requested Larkin to try to locate Davis, as Gray wanted to speak to him. (XXI, 62-63). Larkin was contactd by Patton between 11:30 p.m. and 11:40 p.m. on January 9th and Larkin proceeded to the intersection of Eighth and Wedgewood Avenues where Davis had been arrested. (XXI, 56, 64). Around 1:00 a.m., Larkin took Davis to the District Attorney General's Office to speak with Generals Shriver, Gray and Johnson and Investigator Sledge. (XXI, 57). During the interview, Davis was advised of his right to the presence of an attorney; Davis indicated he wanted to talk to them about the instant case. (XXI, 57-58). For the first hour and a half, Davis repeated the substance of his earlier statements in which he provided the petitioner with an alibil. (XXI, 559-60). However, after Davis had conferred with General Gray in private, Davis told them what he had testified to at trial. (XXI, 60-61). The interview was completed around 4:00 a.m., at which time the witness drove Davis home. (XXI, 61, 70).

Sterling Gray, an Assistant Attorney General, testified that he spoke with Davis' attorney, George Duzane, on January 6th and 7th and told him he wanted to speak to Davis. Duzane told him he had been in contact with Davis and that Davis was supposed to come by his office. (XXI, 73). On January 8th, Gray saw Detective Larkin and told him he needed to talk to Davis. (XXI. 73).

Preceding the interview in question, Gray advised Davis of his right to the presence of an attorney. Davis

requested his attorney but before Gray could even dial the phone, Davis stated that he would talk to them about the present case. (XXI, 76). During the private meeting in Gray's office which Davis requested, Davis told Gray that he did not want to be known as a "snitch" and that "this is heavy;" Davis then proceeded to detail the events of the fatal night in conformity with his trial testimony. (XXI, 78). Nothing was said to Davis concerning a grant of immunity until Monday morning, at which time Davis gave a formal counseled statement. (XXI, 79). Gray added that Davis was calm and not scared during the Saturday morning interview. (XXI, 78). Gray also stated that the matter of indictment was raised by Davis, was not discussed at any length, and was couched in terms of Davis leaving himself open to be indicted. (XXI, 82-83).

HOW THE QUESTIONS WERE RAISED BELOW

The petitioner did not object to the alleged "conversion" of witness Victor Davis prior to trial by way of a motion in limine, a motion to suppress, or a motion for continuance. Likewise, the petitioner did not object to the admission of Davis' testimony during trial. The petitioner initially objected to the alleged "conversion" of Victor Davis at the trial court level in the post-trial motion hearing.

In his motion for a new trial and on his direct appeal to the Supreme Court of Tennessee, the petitioner raised the same complaints he presents here concerning the alleged "conversion" of Victor Davis.

As to the five instances of alleged prosecutorial misconduct of which the petitioner complains, the petitioner preserved his complaints in his motion for a new trial and raised the issues on his direct appeal to the Supreme Court of Tennessee. However, the petitioner at trial contemporaneously objected to only two of the allegedly declarative statements made by the prosecutor during the direct examination

of Victor Davis and the petitioner did not object prior to or during trial to the remaining four instances of alleged prosecutorial misconduct.

The petitioner's complaint concerning the trial court's suppression of the proposed testimony of Dr. Thomas Ogletree regarding the relationship between youth and accountability for decision-making or maturity was preserved by the petitioner at trial, in his motion for a new trial and on his direct appeal to the Supreme Court of Tennessee.

REASONS FOR DENYING THE WRIT

The respondent insists that the Supreme Court of Tennessee correctly affirmed the trial court's judgment approving the jury's verdicts finding the petitioner guilty of three counts of first degree murder, two counts of armed robbery and two counts of assault with the intent to commit first degree murder and fixing his punishment at death on the first degree murder convictions and life in the state penitentiary on the remaining convictions. The Supreme Court of Tennessee did not decide a federal question of substance not heretofore determined by this Court or decide such a question in a way not in accord with the applicable decisions of this Court, another state court of last resort, or a federal court of appeals. See Supreme Court Rule 19(1)(a). There being no special and important reasons for a grant of certiorari in this case, the Court in its sound judicial discretion should deny the writ sought here.

I. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S FACTUAL AND LEGAL CONTENTION THAT THE CUMULATIVE EFFECT OF ALLEGED PROSECUTORIAL MISCONDUCT VIOLATED HIS RIGHT TO A FAIR TRIAL AND INFRINGED UPON HIS RIGHT TO PREPARE AND CONDUCT HIS DEFENSE.

A. The prosecution did not improperly "convert" Victor Davis into a witness hostile to the defense.

Under the guise of an allegation of "prosecutorial misconduct" concerning the use of Victor Davis as a witness in the respondent's proof-in-chief, the petitioner apparently argues that the prosecution illegally "converted" Davis from an alibi witness into a witness hostile to the defense, thus denying the petitioner his constitutional right

to prepare and present a defense. According to the petitioner, Davis was a "declared witness" for the defense and was thus somehow required to testify in accordance with his earlier statements in which he corroborated the petitioner's alibi defense and was correspondingly prohibited from discussing his knowledge of the case with the prosecution.

In rejecting the petitioner's argument on this point, the Supreme Court of Tennessee reiterated the well-established rule that it is not possible in law to "convert" a witness in a criminal case into a witness for either the prosecution or the defense since prospective witnesses are not partisans and do not belong to either party. 632 S.W.2d at 546. As stated by the court:

> The purpose of an investigation and trial is to get to the truth. This sometimes entails the interrogation of witness (sic) on several occasions before truth is distilled in its purity. Neither party can have its investigation limited merely by declaration that a witness will testify in behalf of the other party.

Id.

Although the petitioner quarrels with the state courts' analysis of his complaints from the posture of the petitioner attempting to rely upon the constitutional rights of Victor Davis in asserting that his Sixth Amendment right to compulsory process and his Fourth Amendment right to due process were violated by the actions of the prosecution, the respondent submits that the state courts did not misapprehend the actual thrust of the petitioner's argument and correspondingly correctly refused to find a violation of the petitioner's constitutional rights. The respondent additionally asserts that the petitioner's reliance upon Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972) and Washington v. Texas, 388 U.S. 14, 18 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) is grossly misplaced upon the facts presented here and

thus no re-evaluation of these cases is necessary or required.

In Webb v. Texas, supra, the trial judge not only threatened the defendant's sole witness with a charge of perjury and detailed at great length the ramifications of a conviction for such if the witness testified untruthfully, but also encouraged defense counsel to permit the witness to refuse to testify. 409 U.S. at 96-97. Under these circumstances, it is not difficult to comprehend either the reason for the witness' disinclination to testify as to any matter or the per curiam opinion of this Court which found the defendant's due process rights were violated since the trial judge's unduly harsh admonition precluded the witness from voluntarily exercising his prerogative to testify or not to testify. 409 U.S. 97-98. Similarly, Washington v. Texas, supra, involved the application of a state statute which arbitrarily disqualified co-defendants from testifying for the defense, but not the prosecution. After finding that the Sixth Amendment's right to the compulsory process of witnesses encompassed the right to due process of law in a state criminal trial, this Court aptly summarized its findings:

> We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense. The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use.

388 U.S. at 23.

The respondent further submits that the petitioner's citation to State v. Burri, 87 Wash.2d 175, 550 P.2d 507 (1976) is likewise misplaced. In an en banc decision,

the Washington Supreme Court held that the prosecution violated a state statute which apparently permitted the calling of a "special inquiry hearing" to investigate suspected criminal activities when it summoned the previously indicted defendant's alibi witnesses to such a hearing to give sworn testimony. Neither the defendant nor his counsel were present at the ex parte hearing and the prosecuting attorney admonished or instructed the witnesses to not discuss their testimony therein with anyone. Beyond finding that the testimony was illegally obtained, the court also held that the defendant had been denied his right to prepare for trial since the defendant, in view of the prosecutor's instructions, was precluded from preparing a defense. 550 P.2d at 511.

The Burri court also stated that it could not hold that the trial court abused its discretion in dismissing the underlying indictment against the defendant, since the transcript of the testimony garnered from the unauthorized special inquiry hearing was not in the appellate record and thus the court had no way to independently determine whether the violation of the defendant's right to counsel and his right to the compulsory process of witnesses was harmless. 550 P.2d at 512-13.

In marked contrast to the preceding cases, the instant case does not contain elements of a trial judge effectively forcing the sole defense witness from the stand, a state statute which unconstitutionally and arbitrarily disqualifies any co-defendant from testifying in defense of the defendant, or a violation of a state statute permitting the taking of sworn testimony at a special inquiry hearing, which violation was compounded by the prosecuting attorney's instruction to defense witnesses which simply sealed the lips of such witnesses. Quite simply, the case sub judice involves nothing more than the voluntary decision of Victor Davis to renounce his previous statements regarding the petitioner's involve-

ment in the crime in favor of testifying truthfully at trial. When viewed within the context of this analysis, it is readily apparent that the Supreme Court of Tennessee correctly interpreted the crux of the defendant's argument and correctly rejected such argument under the facts of the case.

B. The Supreme Court of Tennessee fully considered and correctly rejected the petitioner's factual and legal contentions regarding the cumulative effect of alleged prosecutorial misconduct at trial.

The petitioner concedes that the five instances of alleged prosecutorial misconduct of which he complains do not, in and of themselves, present a substantial federal question.[2] However, according to the petitioner, these instances are augmented in their effect to the magnitude of a federal question when viewed in the context of the prosecutions's "conversion" of Victor Davis from an alibi witness to a witness for the prosecution.

In response, the respondent respectfully submits that upon full consideration of the record, the Supreme Court of Tennessee correctly concluded that the petitioner's allegations had no basis in fact or law in the context of this case. The respondent additionally contends that there is no indication that the Supreme Court of Tennessee in its consideration of the case ignored the petitioner's

---

[2] These instances of alleged prosecutorial misconduct include: the form of the questions asked of Victor Davis on direct examination, portions of the prosecuting attorney's closing argument during the guilt phase of the trial wherein the prosecutor allegedly injected his personal opinion concerning the veracity of Victor Davis, a portion of the prosecuting attorney's closing rebuttal argument during the guilt phase of the trial wherein the prosecuting attorney argued matters not in evidence, the alleged withholding of notice to the defense of the existence of Debra Ann Smith and the notice given to the petitioner by the respondent as to the exact time of the commission of the crime.

"cumulative effect" theory in rejecting the petitioner's complaint. Given that the highest court in Tennessee correctly found no impropriety in the actions of the prosecution prior to and during trial, it is clear that the very underpinning of the petitioner's argument that a substantial federal question is raised by an accumulation of instances of alleged prosecutorial misconduct, is destroyed and the petitioner's position on the matter is accordingly without merit.

II. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S FACTUAL AND LEGAL CONTENTION THAT THE TRIAL COURT ERRED IN SUPPRESSING THE PROPOSED TESTIMONY OF DR. THOMAS OGLETREE REGARDING THE RELATIONSHIP BETWEEN YOUTH AND ACCOUNTABILITY FOR DECISION-MAKING OR MATURITY.

The petitioner asserts that the Supreme Court of Tennessee and the trial court erred in ruling inadmissible during the sentencing phase of the bifurcated trial the proposed testimony of Dr. Thomas Ogletree regarding the relationship between youth and accountability for decision-making or maturity. (XX, 86, 88). According to the petitioner, the exclusion of the proposed testimony of Dr. Ogletree deprived the jury of the guidance necessary to evaluate the mitigating factors the petitioner sought to propound. The respondent respectfully submits that the proposed testimony was properly suppressed.

In Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), this Court stressed the crucial importance of an informed decision-making body charged with determining whether a sentence of life or death should be imposed in a capital punishment case and opined that "(w)hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." (Emphasis supplied).

428 U.S. at 276; see also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 1859 (1976); Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). In analyzing the instant complaint, the Supreme Court of Tennessee noted that Tenn. Code Ann. § 39-2404(c) is significantly broader than the federal requirements of due process in that the statute permits the admission into evidence of "any matter that the court deems relevant to the punishment...regardless of its admissibility under the rules of evidence."

In the context of the instant case, the respondent asserts that the trial court properly excluded the tendered testimony as not being relevant to this particular petitioner and that the Supreme Court of Tennessee correctly concurred in the trial court's determination. During a jury-out hearing, Dr. Ogletree admitted that he had never interviewed or treated the petitioner and that he had not reviewed the petitioner's record. (XX, 86). Thus, Dr. Ogletree's proposed testimony was not relevant to the nature and circumstances of the crime or the petitioner's character, background history and physical condition and could not possibly have assisted the jury in making an informed decision as to the proper sentence to impose upon this particular petitioner. Specifically bearing in mind that the trial court did not exclude any relevant evidence as it pertained to this individual petitioner or the circumstances of this particular crime, the respondent insists that the exclusion of the tendered proof was proper in all respects.

The respondent additionally asserts that the petitioner's reliance upon Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, ___ L.Ed.2d ___ (1982) is misplaced and is of no avail. In Eddings, this Court reversed the sentence of death imposed upon a sixteen year old defendant where the sentencing judge refused to consider

as a matter of law the defendant's violent and turbulent family history. Throughout the opinion, the Court repeatedly stressed the importance of the sentencing body having before it any mitigating evidence relating to the individual defendant's character or background and relating to the circumstances of the particular crime. In contrast to the Court's finding that the mitigating evidence of Eddings' background and mental and emotional development was individual or peculiar to Eddings, the proposed testimony here had no relationship to the uniqueness of the petitioner's character or to the circumstances of the crime. The respondent therefore respectfully posits that Dr. Ogletree's testimony was properly excluded as being irrelevant to the issue of the proper punishment for this particular petitioner.

CONCLUSION

For the reasons stated herein, the respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT A. BROWN
Deputy Attorney General
-Counsel of Record-
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-7859

KYMBERLY LYNN ANNE HATTAWAY
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-2216

AFFIDAVIT OF CERTIFICATE OF SERVICE

STATE OF TENNESSEE)
) ss
COUNTY OF DAVIDSON)

I, ROBERT A. GRUNOW, being first duly sworn, make oath that I am a member of the Bar of the Supreme Court of the United States. I have previously entered my appearance as counsel of record in behalf of the respondent in this cause, the State of Tennessee.

I further certify that on this 19th day of August, 1982, I deposited ten copies of the instant Brief in Opposition to Petition for Writ of Certiorari in a United States mailbox, with first-class postage prepaid, properly addressed to the Clerk of this Court and within the time allowed for filing; that I deposited one copy of the instant Brief in Opposition to Petition for Writ of Certiorari in a United States mailbox, with first-class postage prepaid, properly addressed to the Honorable J. Michael Engle, Suite 100, 306 Gay Street, Nashville, Tennessee 37201, and within the time allowed for service; that I deposited one copy of the instant Brief in Opposition to Petition for Writ of Certiorari in a United States mailbox, with first-class postage prepaid, properly addressed to the Honorable Robert L. Smith, Suite 1000, Parkway Towers, Nashville, Tennessee 37219, and within the time allowed for service.

I further certify that all parties required to be served have been served.

ROBERT A. GRUNOW
Deputy Attorney General

Sworn and subscribed before me this 19th day of August, 1982.

NOTARY PUBLIC

My Commission Expires:

July 21, 1985